Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2110

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF MACON, GEORGIA,

Petitioner,

v.

PASCO BUILDING SYSTEMS, a Division of AMCORD, INC., and DELTA ASSOCIATES, INC.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

May Georgia courts decide as a matter of Georgia law that the issue of alleged negligence was fully adjudicated in a prior action in federal court, and thus the Petitioner, City of Macon, is barred, pursuant to the doctrines of collateral estoppel and *res judicata*, from relitigating the same issue?

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STATEMENT OF THE CASE

In order to avoid apparent inaccuracies and omissions, certain additions to Petitioner's Statement of Facts are necessary to an understanding of the case.[1]

[1] Respondent Delta Associates, Inc., adopts Petitioner's Appendix as the Joint Appendix. References are to that appendix, e.g. (J.A.5).

The City of Macon, Georgia ("City") owned land at the Airport. The City deeded certain land to the Macon-Bibb County Industrial Authority ("MBIA" or "Authority"). The Authority then owned the land; it sold revenue bonds; it contracted for the design and construction of the hangar; it leased the hangar; it collected rent; it made the payments on the bonds. In the future, when the bonds were to be retired, the land and hangar would revert to the city's ownership. (J.A.2)

Thus, Petitioner's assertion that "the mere recital regarding title should be of no moment to a resolution of the claims . . . " is not accurate. As determined by the Georgia courts, applying Georgia law, the Authority and the City had coincident interests in the hangar for purposes of determining privity, collateral estoppel, and *res judicata*. (J.A.2)

Delta Associates, Inc. (hereinafter "Delta") is a small civil engineering firm which contracted directly with the Authority, owner, to provide certain civil engineering services in connection with the layout, location, and overall parameters of the metal hangar (a "Butler" type building). (J.A.1)

Pasco Building Systems ("Pasco") designed and manufactured the metal hangar pursuant to the parameters specified by Delta. (J.A.1)

The storm which destroyed the hangar was officially classified by the National Weather Service's Storm Data Report for March 1982 as a severe Downburst wind storm. Downbursts are extremely strong winds of high velocity which emanate out of high cumulus clouds of a thunderstorm, and are capable of causing severe damage,

with winds which can exceed 125 miles per hour in a very small localized area. For example, a downburst may hit a single airplane approaching an airport and not affect any other airplane or other part of the airport.

One of the expert witnesses identified by the Petitioner, Dr. Theodore Fujita, of the faculty of the University of Chicago, serves as a consultant to the National Weather Service. Dr. Fujita testified that he edits the National Weather Service Monthly Storm Data Report; that he classified this storm as a Downburst; and that, based on certain facts he reviewed both in connection with the classification of the storm and after his classification of the storm, the winds which hit the hangar, in his opinion, exceeded 110 miles per hour.

All parties agree that the hangar, if properly specified, designed, and constructed, should withstand winds up to 100 miles per hour, but if winds exceeded 100 miles per hour, the hangar would be expected to collapse.

Following the Downburst wind storm, the insurance company which insured both the Authority and the City paid for the cleanup and reconstruction of the hangar and obtained a "loan receipt" that pledged the loan amount to be repaid from any recovery which the City and/or the Authority might obtain from the Defendants. (J.A.3)

The Authority's tenant in the hangar sued the Authority, Pasco, Delta, and others, for damage to its airplanes, in the United States District Court for the Middle District of Georgia. The Authority filed a crossclaim against Pasco and Delta for indemnity for any liability it had to the plaintiff, its tenant for damages allegedly

caused by the negligent specification, design, and construction of the hangar. (J.A.1)

The single dispositive fact issue in both cases is whether or not the winds exceeded 100 miles an hour. The prior case was tried to a jury in U. S. District Court. The jury determined that the winds indeed exceeded 100 miles an hour, and that the defendants, Pasco and Delta, were not negligent in the specification, design and construction of the hangar, and delivered a general verdict in favor of all defendants (the three parties to this case). (J.A.1)

Petitioner states that the verdict "mooted" any issue of potential liability of Pasco and Delta to the City. To the contrary, the verdict decided any issue of potential liability by determining that Defendants Pasco and Delta were not negligent.

Following the verdict in District Court, the Defendants in the Superior Court of Fulton County, Georgia moved for summary judgment. The trial court granted the motion, and ordered:

> It appearing that City of Macon is a privy of the MBIA [Authority] and that the issue of Defendants Pasco's and Delta's alleged negligent construction of the hangar was fully adjudicated in the prior federal suit, City of Macon is barred from relitigating the aforesaid negligence issue pursuant to the doctrine of collateral estoppel (estoppel by judgment). (J.A.10)

The Georgia Court of Appeals affirmed. (J.A.1-5)

ARGUMENT

Georgia courts may decide, as a matter of Georgia law, that the City is barred from relitigating the issue of the Defendants' alleged negligence in the specification, design, and construction of the hangar.

The existence of privity between the City and the Authority is uniquely an issue of state law, and does not involve a federal question. Georgia courts appropriately determined, under Georgia law and the facts of this case, that the City and the Authority had a coincidence of interests in the hangar, and that privity existed for the purpose of this lawsuit.

The principles of collateral estoppel and *res judicata* are matters of state law. The Georgia courts decided appropriately, under the facts of this case, that the City was barred from relitigating the same issues previously decided by a jury in federal court.

In the prior case, the City's/Authority's claim for indemnity was based entirely on the fact question of whether Pasco and Delta were negligent in the specification, design and construction of the hangar. The District Court jury found that they were not negligent. That is the identical fact question upon which the City's claim for damages is based in this case.

Petitioner argues that the Georgia courts have applied *res judicata* to abrogate the Federal Rules of Civil Procedure. That is not the precedent set by this case. The Georgia courts correctly decided that the identical question of fact upon which the City's claim is based was previously decided in an action in which the City

(through the Authority, its privy) asserted a crossclaim for indemnity.

This case does not turn on the failure of the City to assert a permissive counterclaim in the prior federal court case. The case turns on the estoppel effect of the prior decision by the jury in the federal case that these defendants were not negligent and hence neither liable to the plaintiff on the complaint nor to the City for indemnity on the crossclaim.

CONCLUSION

Any case in which a party petitions this Court for review is important to the litigants. This is a large claim case. However, it does not present an issue or special important reasons justifying the Court to exercise its judicial discretion to review.

This case turns on Georgia law, not federal law.

This case is not in conflict with decisions of other state courts or federal courts.

Furthermore, the Georgia Courts did not decide a federal question in conflict with applicable decisions of this Court.

Georgia courts decided as a matter of Georgia law issues of privity, collateral estoppel, and perhaps *res judicata*. The City is barred from asserting its claim against these Defendants because the issue of alleged negligence asserted in its crossclaim for indemnity decided by the jury in the prior case is identical to the City's claim for the damage to the hangar in this case.

Even if, as Petitioner asserts, the Georgia courts decided *"sub silentio"* federal questions in conflict with federal procedures (which we urge it did not), there is no basis for certiorari. By Petitioner's argument, if the purported error is *sub silentio*, it is of no import to the federal judicial system and creates no precedent to misguide other courts. Further, the decision has no effect outside of Georgia, and in essence, this petition seeks review of the Georgia Court of Appeals' decision, applying Georgia principles of privity, collateral estoppel, and perhaps *res judicata*.

This 28th day of July, 1989

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